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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN SALORIO, ROBERT COE and
JOHN D. MCGARR, JR.,

Petitioners,

—v.—

SIDNEY GLASER, Director of the Division of Taxation,
Department of the Treasury of the State of New Jersey,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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September 1, 1983

Question Presented

Whether affording only prospective effect to a judgment invalidating a taxing statute identical in purpose, structure, operation and effect to a statute previously declared unconstitutional by this Court undermines the principle of *stare decisis*, and signals to the states that even facially unconstitutional legislation can be used to raise revenue without any serious risk that funds so collected will ever have to be refunded.

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JOHN SALORIO, ROBERT COE and
JOHN D. MCGARR, JR.,

Petitioners,

—v.—

SIDNEY GLASER, Director of the Division of Taxation,
Department of the Treasury of the State of New Jersey,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

Petitioners John Salorio, Robert Coe and John D. McGarr, Jr. respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Jersey entered on June 8, 1983.

OPINIONS BELOW

The opinion of the New Jersey Supreme Court, which is not yet officially reported, appears in Appendix A hereto at A1. The opinion of the court of first instance (New Jersey Superior Court, Chancery Division) appears in Appendix B hereto at A23. A prior opinion of the New Jersey Supreme Court, remanding the case to the Superior Court, Chancery Division, for findings of fact, is officially reported at 82 N.J. 482, 414 A.2d 943 (1980).

JURISDICTION

The judgment of the New Jersey Supreme Court was entered on June 8, 1983. This petition was filed within 90 days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Statutory and Constitutional Provisions Involved

New Jersey Emergency Transportation Tax Act (Commuter Income Tax), 54 *N.J. Stat. Ann.* §§ 8A-1-8A-57 (West Supp. 1983).

Reprinted in Appendix D to this Petition for Certiorari.

U.S. Const., Art. IV, § 2, cl. 1

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Statement of the Case

A. Preliminary Statement

Petitioners are citizens and residents of the State of New York who work or who have worked in the State of New Jersey, and who have therefore been subject to New Jersey's Commuter Income Tax, which falls exclusively on New Yorkers. Although the Commuter Income Tax is indistinguishable from the discriminatory commuter tax struck down under the Privileges and Immunities Clause in *Austin* v. *New Hampshire*, 420 U.S. 656 (1975), petitioners were required to expend more than six years in the New Jersey State courts relitigating precisely the issue decided in *Austin*. Until the New Jersey Supreme Court finally held, in June 1983, that the Commuter Income Tax violates the Privileges and Immunities Clause, the State of New Jersey continued to collect the unconstitutional tax.

The New Jersey Supreme Court nevertheless applied its ruling prospectively only, and refused to award petitioners any refunds of taxes paid after the date of the *Austin* decision. By postponing the effective date of its decision to January 1, 1984, the Court permitted the State to reap a substantial windfall, and sanctioned its defiance of this Court's decree. If permitted to stand, this aspect of the judgment of the Court below will be a clear signal to state and local governments that the risks entailed by ignoring this Court's decisions are minimal. The states will conclude that even plainly unconstitutional statutes may be counted on to raise revenue until the judicial process ends and the legislation is invalidated.

This Court should therefore grant certiorari to protect the integrity of *stare decisis* in constitutional litigation.

B. New Jersey's Commuter Income Tax

Pursuant to the Commuter Income Tax, first enacted in 1961, New Jersey has taxed New York residents who derive income in or from the State of New Jersey at rates that range from 2% to 15% of taxable income. New Jersey residents, however, paid no income tax whatsoever on their income derived from New Jersey until 1976, and since that time have paid income taxes of 2% to 3%, under a separate tax called the New Jersey Gross Income Tax.[1]

While New Jersey residents are theoretically subject to the Commuter Income Tax,[2] only New York residents pay the tax

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1 New Yorkers working in New Jersey are subject to the Gross Income Tax as well as the Commuter Income Tax, and are required to pay whichever tax results in the higher levy.

2 By its terms, the Commuter Income Tax is imposed (a) upon residents of New Jersey on their income earned in another "critical area state" and (b) upon *all* income—including rents, capital gains, and so forth—derived from New Jersey by persons who are not residents of New Jersey but who reside in a "critical area state." 54 N.J. Stat. Ann. § 8A-2 (West Supp. 1983). A "critical area state" is one bordering on New Jersey as to which the State Highway Commissioner

in practice. The statute provides New Jersey residents working in New York with a credit against the Commuter Income Tax for income taxes which they pay to New York. 54 N.J. Stat. Ann. § 8A-16 (West Supp. 1983). Since New York's income tax is identical in rate with the Commuter Income Tax, New Jersey residents who work in New York pay income taxes to New York which necessarily equal the Commuter Income Tax; they therefore receive a full credit and pay no Commuter Income Tax to New Jersey. Thus, no New Jersey resident has ever paid a penny under this tax. Indeed, New Jersey residents have been exempted from filing returns for the Commuter Income Tax. 54 N.J. Stat. Ann. § 8A-19(b) (West Supp. 1983); [1980] 1 N.J. Tax Reporter (CCH) §§ 18-301, 305.

The New Jersey Commuter Income Tax on New York residents is, and has been since its inception, identical in all significant respects with the New York State income tax. For example, the rate table for the Commuter Income Tax is a carbon copy of the rate table for New York's income tax as set out in the New York statute books.[3] Not only are the tax rates and structures of the two taxes identical, but each time New York has amended its income tax statute in any significant respect, New Jersey has shortly thereafter enacted an identical change.

Significant to the analysis required by *Austin* v. *New Hampshire*, 420 U.S. 656 (1975), New Jersey does not impose any tax which is payable by New Jersey citizens alone—all of New Jersey's other taxes are imposed upon residents and nonresidents alike.

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has certified that there exists a "critical transportation problem" relating to the commutation between New Jersey and the bordering state. 54 N.J. Stat. Ann. § 8A-5 (West Supp. 1983).

The only "critical area" which has ever been certified is the New York-New Jersey border. Therefore, residents of New York who work in New Jersey and New Jersey residents who work in New York are theoretically subject to the Commuter Income Tax.

3 Compare 1978 N.J. Sess. Laws, Ch. 131, with 59 New York Tax Law § 602 (McKinney 1982) and 1978 N.Y. Sess. Laws, Ch. 70.

The purported justification for the Commuter Income Tax is the burden that nonresident commuters allegedly place upon New Jersey's transportation facilities. But the tax has never been adjusted during its entire twenty year history to reflect any transportation needs or burdens; its rates are set solely to conform with New York's statute. Indeed, Governor Meyner, in his original message to the New Jersey legislature, candidly stated that the intent of the statute was to take advantage of tax credits granted by New York State's income tax scheme and divert tax revenues from New York. *See*, Day, *Taxing Interstate Commuters: A New Jersey Experiment Under The United States Constitution*, 18 Rutgers L. Rev. 1, 2 (1963).[4]

Moreover, imposition of the tax is not limited to New Yorkers who actually commute to New Jersey; rather, the tax is levied on *all* income derived by New Yorkers from New Jersey, including rents and capital gains, whether or not the New York resident ever sets foot in New Jersey. Yet neither Connecticut nor New Jersey residents who use the very same transportation facilities are taxed.

The New Jersey tax is identical in all significant respects to the discriminatory commuter tax invalidated by this Court in *Austin* v. *New Hampshire*, 420 U.S. 656 (1975).

—Each commuter income tax is a duplicate of the income tax imposed by the bordering state;

—Each was designed to, and has the effect of, taking advantage of tax credits granted by the bordering state in order to divert income tax revenues from that bordering state;

—Each is nominally imposed on residents and nonresidents, but, by means of credits or exemptions, in fact is imposed only on nonresidents;

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4 While the proceeds of the tax assertedly are kept in a special fund for transportation projects, 54 N.J. Stat. Ann. §§ 8A-20-23 (West Supp. 1983), transfers from that fund may be and have been made regularly to the State's General Fund and to the Property Tax Relief Fund. *See* 54 N.J. Stat. Ann. § 8A-121 (West Supp. 1983).

—Each taxing state requires employers to withhold portions of the nonresidents' income for payment of the commuter income tax;

—Each commuter income tax "falls exclusively on the income of nonresidents; and it is not offset even approximately by other taxes imposed upon residents alone." *Austin* v. *New Hampshire*, 420 U.S. at 665.[5]

This Court concluded that the New Hampshire tax could be upheld only if, looking to "the practical effect and operation" of the taxing scheme, "the nonresident was not treated more onerously than the resident in any particular, and in fact was called upon to make *no more than his ratable contribution to the support of the state government*." 420 U.S. at 664 (emphasis added).

Although New Hampshire attempted to argue that the tax did not discriminate at all between Maine and New Hampshire citizens, this Court ruled flatly that the New Hampshire tax could not be sustained under the principle of "substantial equality of treatment," because the "tax falls exclusively on the income of nonresidents; and it is not offset even approximately by other taxes imposed upon residents alone." 420 U.S. at 665.

The discriminatory effect of the New Jersey Commuter Income Tax is identical with that of the invalid New Hampshire tax. The New Jersey Commuter Income Tax falls only on nonresidents—in this case, only New Yorkers—and the tax on New York residents' income (up to 15% of taxable income) is not even approximately offset by taxes that New Jersey has imposed *only* upon its *own residents*.

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5 In this and other respects, the New Jersey Commuter Income Tax is worse than the New Hampshire tax invalidated in *Austin*. New Hampshire residents did pay some taxes to which nonresidents were not subjected. *See Austin v. New Hampshire*, 420 U.S. at 659 n. 3. Moreover, the maximum rate paid by Maine residents in *Austin* was 4%, whereas the Commuter Income Tax imposed on New Yorkers has ranged as high as 15%.

The State of New Jersey recognized that the constitutional fate of its statute was inextricably tied to that of the New Hampshire tax. Thus, New Jersey submitted an *amicus* brief to this Court in *Austin* (on behalf of New Hampshire) which conceded that the two states' commuter income tax schemes were "similar." *See* Amicus Curiae Brief of the Attorney General of the State of New Jersey at 3, *Austin* v. *New Hampshire*, 420 U.S. 656 (1975). The New Jersey Supreme Court has also stated that "[t]he mechanics of the [Commuter Income Tax] are strikingly similar to the invalidated New Hampshire tax." *Salorio* v. *Glaser*, 82 N.J. 482, 504 n.17, 414 A.2d 943, 953 n.17 (1980). And in evident recognition of the constitutional infir.nities of its tax in the wake of *Austin*, the proceeds of the tax were held separate for a period of at least two years pending the outcome of this challenge to the tax, and were disbursed only at the end of each fiscal year.

C. New Jersey's Evasion of this Court's Decree in *Austin*

Austin therefore clearly foreshadowed—indeed, compelled—a ruling that the Commuter Income Tax contravenes the Privileges and Immunities Clause. Yet New Jersey managed to stave off compliance with the teaching of this Court for more than six years, meanwhile collecting as much as $40 million each year from citizens of New York.

After substantial dilatory and frivolous motion practice,[6] which helped to delay the case for over a year before the merits could even be addressed, the State attempted to distinguish

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6 Thus, for example, the State (1) moved to dismiss the case for failure to exhaust administrative remedies—in the face of uniform authority holding that no exhaustion is necessary in a constitutional challenge to a statute; (2) moved to dismiss for failure to join New York State as a "real party in interest," even though New Jersey previously had argued—and this Court had held—that only individual citizens, and not the State of New York, had standing, *New York* v. *New Jersey*, 429 U.S. 810 (1976); and (3) moved to dismiss on the ground that plaintiffs lacked standing—on precisely the same argument raised and squarely rejected in *Austin* v. *New Hampshire*, 420 U.S. at 659-60 n. 4.

Austin on the ground that the tax is justified by the costs New Yorkers impose on New Jersey's transportation facilities. Yet such a justification must be meaningless as a matter of law. By definition, a nonresident who works in a neighboring state and thereby earns income can do so only by transporting himself there. This interstate commutation necessarily will impose some cost or "burden" upon the transportation facilities of the taxing state. *Austin* necessarily presented precisely the same problem, and therefore must be read to hold that the "transportation problem" created by the mere movement of residents of one state to work in a neighboring state cannot serve as a legitimate justification for a discriminatory tax. Otherwise, *Austin* would be a nullity.

And this "cost" justification was frivolous as a matter of fact as well. For not only had the tax been enacted and modified solely to capture income from New York, and in disregard of any transportation cost issues (*see* pp. 3-5, *supra*), but the State was unable to advance any evidence at the five day hearing on this matter that New Yorkers constituted the "peculiar source" of the alleged transportation problem, *Toomer* v. *Witsell*, 334 U.S. 385, 398 (1948); *Hicklin* v. *Orbeck*, 437 U.S. 518, 526-27 (1978), or that there was a "substantial relationship" between the burdens New Yorkers imposed on the transportation system and the discrimination practiced against them. *See Toomer* v. *Witsell*, 334 U.S. at 398-99. Indeed, how could it have done so? As the New Jersey Supreme Court noted, "New Jersey to New York commuters substantially outnumber those travelling from New York to New Jersey," and New Yorkers constitute a tiny fraction—2.9% in 1970 and 4.0% in 1980—of the total number of interstate and intrastate commuters using New Jersey's facilities. *See* Appendix A at A12.[7] New Yorkers thus travel ***against***

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7 Between 1962-1980, the tax generated $381 million from New Yorkers. Yet, even according to the State's own testimony, there was a gross disparity between the sums collected and the costs attributable to New York commuters. The New Jersey Supreme Court assumed without deciding that the State was correct that New Yorkers paid

the peak flow of traffic, which consists of New Jerseyans commuting to New York.

Recognizing that the tax could not be justified under *Austin* by reference to the additional costs New Yorkers impose on New Jersey's transportation facilities, the State essentially abandoned its attempt to defend the tax on this ground, and instead concocted a novel—and incoherent—"benefits" theory, which was ultimately, and properly, rejected by the New Jersey Supreme Court (Appendix A at A11). On this theory, New York commuters (like any other user of New Jersey transportation facilities) receive some theoretical total amount of "benefits" from travelling on New Jersey roads (such as reduced travel time and savings on tire wear); the dollar amount of such benefits is necessarily a multiple of the costs imposed by New Yorkers; and New York commuters may be taxed in an amount equivalent to these theoretical "benefits". But New Jersey taxes its *own* residents on the basis of costs it incurs, and not on benefits New Jerseyans enjoy; the State does not make a profit off its citizens. On the State's theory, however, since the dollar amount of benefits exceeds the dollar amount of transportation costs, New Jersey *can* make a profit, but only off New York commuters.[8]

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twice as much in taxes as the costs attributable to them, because the Court concluded that the Privileges and Immunities Clause was violated by a disparity of this magnitude. The record below demonstrates clearly, however, that the proceeds of the tax were actually between *nine* and *thirty* times higher than maximum state and local government transportation expenditures that could conceivably be attributed to New Yorkers. Indeed, New Yorkers' payments under New Jersey's gasoline tax alone more than covered their share of any state transportation costs.

8 In any event, the "benefits" test is purely tautological—a New Yorker's *share* of benefits is precisely the same as his *share* of costs; the State measured both on the basis of percentage of use of transportation facilities. New York commuters represent only about 1% of total usage of transport facilities, and yet their tax payments are many times more than 1% of total payments for transportation in New Jersey. As the trial court recognized, on the State's theory, New Yorkers must pay

In short, as was clear from the outset of this litigation, and as the New Jersey Supreme Court ultimately held, New Jersey's "transportation" justification for its discriminatory tax was a makeweight which could not withstand serious analysis. But by ruling that its decision voiding the Commuter Income Tax would be afforded prospective effect only, and that petitioners would not be awarded refunds of taxes paid to the State since *Austin*, the New Jersey Supreme Court rewarded the State for gambling that it would not be penalized for failing to comply with a controlling precedent of this Court.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT THE WRIT TO RESTRAIN THE INVOCATION OF THE PROSPECTIVITY DOCTRINE AS A DEVICE FOR AVOIDING *STARE DECISIS*, AND TO ENSURE THAT STATES DO NOT CONTINUE TO ENFORCE UNCONSTITUTIONAL REVENUE STATUTES BECAUSE OF A BELIEF THAT RETROSPECTIVE RELIEF WILL RARELY, IF EVER, BE AWARDED.

Before a rule of law can be afforded prospective effect only, it is well-settled that

> "[t]he decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed."

Chevron Oil Co. v. *Huson*, 404 U.S. 97, 106 (1971) (citations omitted). The justification for limiting prospectivity to cases that announce a new legal standard is that any other rule would vitiate the rule of *stare decisis* and undermine the role of this Court as the ultimate arbiter of questions of constitutional

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a dollar for each dollar of benefit, while New Jersey residents pay no more than 12-16 cents for the same dollar of benefit. (*See* Appendix B at A30.)

dimensions. Retrospective application of established legal principles through damage awards is what gives this Court some assurance that, by and large, its decisions will actually govern the behavior of persons in similar circumstances.[9] Such assurance is of particular significance because of the practical inability of the courts—and of this Court in particular—to provide review of every statute of dubious constitutional validity.

Vigilant monitoring by this Court is especially necessary when the doctrine of prospectivity, designed as a shield against unexpectedly harsh or unjust results when a new legal principle is announced, is instead invoked to avoid the impact of controlling precedent. Prospectivity then becomes a sword. It cuts off relief to which persons injured by a clearly unconstitutional statute are entitled, destroys incentives to challenge unconstitutional enactments, and removes the deterrent effect of damage awards on unconstitutional conduct. That, we submit, is what has happened in this case.

Once this Court had decided *Austin* v. *New Hampshire* in 1975, there was no reasonable basis for believing that the New Jersey Commuter Income Tax could pass constitutional muster. The tax should have been declared unconstitutional on its face in a summary proceeding. Rather than acknowledge that the *Austin* decision controlled, however, New Jersey continued to enforce its facially invalid statute while the litigation languished in the state court system for nearly six years.[10] And by

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9 As Professor Mishkin pointed out almost twenty years ago, retroactive application of holdings that can be "reasonably anticipated" helps insure that those who may be affected by such holdings will seek to conform, in advance, to expected standards. Mishkin, *The Supreme Court, 1964 Term-Foreword: The High Court, The Great Writ, and Due Process of Time and Law*, 79 Harv. L. Rev. 56, 72 (1965).

10 It should be pointed out that New Jersey is not the first state that has sought to retain the benefits of invalid tax legislation. Historians have documented numerous instances in which governments have collected taxes under clearly unlawful statutes. *See* O. Field, *The Effect of an Unconstitutional Statute* 318-320 (1935).

1980, when the New Jersey Supreme Court ruled that the *State* had the burden of proof, New Jersey could not possibly argue that it was relying on the presumed constitutionality of a legislative act. *Salorio* v. *Glaser*, 82 N.J. 482, 503-504, 414 A.2d 943, 953-54 (1980). Yet, New Jersey reaped as much as $40 million per year exclusively from New Yorkers, who had no voice in the legislative affairs of New Jersey and whose interests were entirely unrepresented there.[11]

By permitting New Jersey to retain the tax revenues it obtained from New Yorkers and postponing the effectiveness of its decision to strike down the statute until 1984, the New Jersey Supreme Court's judgment tells the states that it is to their advantage to enact revenue statutes without regard to their constitutionality. Legislatures can be secure in the knowledge that, even if their unconstitutional laws are ultimately

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11 Granting the writ is particularly appropriate in this case because *Salorio* concerns a state tax that contravenes the Privileges and Immunities Clause. Non-residents of a state who are subject to a discriminatory tax can generally challenge its constitutionality only in state court. *See* Tax Injunction Act, 28 U.S.C. § 1341 (1976). State court judges, however, are understandably reluctant to void a tax that constitutes a substantial source of revenue for the state. The original New Jersey trial judge in this case, for instance, candidly stated on a number of occasions that he was struggling for a way to uphold the tax, despite *Austin*. He said, for example: "[I]f I could find a way to end it or to avoid *Austin*, I surely would sustain this tax. . . ." Transcript of Proceedings, *Salorio* v. *Glaser*, No. C-3628-76 (N.J. Super. Ct. Ch. Div. Feb. 23, 1978) at 16.

The reluctance to void an unconstitutional tax may extend to a reluctance to apply any such decision retroactively. As this Court recognized in *Lemon* v. *Kurtzman*, 411 U.S. 192, 200 n. 2 (1973), however, constitutional interests cannot be ignored in deciding whether to attach retrospective effect to a constitutional decision. This Court should take this opportunity to reemphasize the importance of the values embodied in the Privileges and Immunities Clause and the appropriateness of securing these values by awarding damages for a clear violation of the principles of *Austin*. Where a state's financal self-interest is implicated, this Court has been particularly vigilant in protecting constitutional principles. *See United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 25-26 (1977).

invalidated, the states will be able to retain any revenues they received in the interim.

Such a misconception will affect more than economic interests. It will impede the operation of the Privileges and Immunities Clause itself. *See*, *Chevron Oil Co.* v. *Huson*, 404 U.S. at 106-107 ("we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation"). Even the temporary enforcement of comparable legislation will have a substantially harmful impact on the ability of thousands of persons like petitioners to travel and pursue their occupations in neighboring states free from discriminatory treatment. It will also disrupt the structural integrity of our federal system by encouraging the passage of retaliatory legislation by the home states of commuters. *See Austin* v. *New Hampshire*, 420 U.S. at 662. Retrospective application of the *Salorio* decision to require refunds of taxes paid since 1975, when *Austin* was decided, or since 1980, when the New Jersey Supreme Court placed on the State the burden of proof to justify the tax, will substantially advance the underlying purposes of the Privileges and Immunities Clause.

The New Jersey Supreme Court's justification for declining to give its ruling retrospective effect was that it was announcing "a new rule of law" and that the State had reasonably relied on the revenues derived from the tax until such time as it was declared invalid (Appendix A at A17-A18). To be sure, this Court has, on several occasions, held that prospective application of a decision was appropriate when an issue of first impression had been decided. *See*, *e.g.*, *Lemon* v. *Kurtzman*, 411 U.S. 192, 206 (1973).

But this is not such a case. *Austin* v. *New Hampshire* not only foreshadowed, but compelled, the invalidation of the Commuter Income Tax. As this Court noted recently in *United States* v. *Johnson*, 457 U.S. 537, 549 (1982):

> "when a decision of this Court merely has applied settled precedents to new and different factual situations, no real

> question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way."

Under such circumstances, this Court simply will not hear it argued that reliance has been placed on the unconstitutional statute; such a "rule would mean that every such unconstitutional statute, like every dog, gets one bite, if anyone has relied on the statute to his detriment." *New York* v. *Cathedral Academy*, 434 U.S. 125, 130 (1977).

To permit the prospective aspect of the judgment below to stand would, in a very direct way, undermine the importance of *stare decisis* in constitutional litigation, and remove a significant constraint on the states' willingness to enact revenue legislation that impinges on clearly articulated and entrenched constitutional values. If the State of New Jersey is permitted to retain the tax revenues it collected in defiance of this Court's decision in *Austin*, the carefully delimited doctrine of prospectivity will have engulfed the general principle that settled rules of law should be afforded retrospective effect.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the prospective aspect of the judgment of the Supreme Court of New Jersey.

September 2, 1983

Respectfully submitted,

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